

Incorporating an existing charity to a charitable company

Introduction

Many organisations think about changing legal structure when the trustees and management committees are concerned about personal liability.

Incorporation means creating a legal identity for the organisation that is different to its members - a corporate body. In an unincorporated association (how many charities and voluntary and communities start out) or trust, the law does not recognise a difference between the organisation and its members - it is simply seen as a group of people.

The biggest advantage of incorporation is in the limited liability for members of the organisation and its governing body. A charitable company can own property and sign contracts in its own name. You should think about becoming a charitable company if your charity has employees, owns property, signs contracts to complete work, has long-term financial commitments such as a lease or runs risky activities.

Unfortunately, an unincorporated association or trust can't simply convert to a charitable company. Instead, your organisation must first form and register a new company (usually a company limited by guarantee) with Companies House using a new governing document called memorandum and articles of association. The new company

must then be registered as a charity with the Charity Commission. The original charity will be closed down once everything has transferred to the new charitable company.

Steps to follow:

1. Check the constitution of the existing charity to see if there is a restriction regarding incorporation (this is not common but should be checked). If there is a restriction then Charity Commission approval must be sought first
2. Check the constitution of the existing charity to see if there is a dissolution clause. If there isn't then the constitution must be amended to include one
3. Talk to your pension provider about your plans. If you use a defined benefit scheme, incorporation may trigger certain pension liabilities so work with your pension provider before incorporation. It is likely you will need to take professional advice
4. Prepare the memorandum and articles of association (sometimes shortened to mem and arts) for the new company
5. Register the company (see **Company registration** below)
6. Register the company as a charity (see **Charity registration** below)
7. Transfer all assets and liabilities from the

old, unincorporated charity to the new charitable company

8. Dissolve (close down) the old charity

Remember that you must follow the provisions in the constitution until the time that the old charity is dissolved.

Stage 1 – Company registration

Prepare the memorandum and articles of association then register the organisation as a company with Companies House. The objects must be exclusively charitable to go on to stage 2. Once registered with Companies House you will receive a certificate of incorporation giving your company registration number. You are then ready to register the company as a charity.

Stage 2 – Charity registration

You can register as a charity yourself or get help from the Newcastle CVS Specialist Services. You can download information about the charity registration application process and the forms you'll need from the Charity Commission website.

Once you submit your application, the Charity Commission will make an initial response within 15 working days. Try to reply quickly to any queries raised by the Commission or your application may be delayed. If you need help, contact Newcastle CVS. When the charity has been registered you will receive formal notification showing the details that will be included on the Register of Charities (which is publicly available) and the registered number of the new charity.

Stage 3 – Transfer or discharge of assets, liabilities and obligations

The new organisation is now set up as a company and a charity. The assets of the

'old' charity can be transferred (see below) to the 'new' charitable company. Everything must be legally transferred from the old organisation to the new charitable company so that problems over ownership of assets, liabilities and who is responsible for outstanding obligations, etc. do not occur in the future.

A set of accounts at the date of transfer will have to be prepared and either audited or independently examined, depending upon the regime the original charity falls under. This will verify the value of assets and liabilities at the date of transfer and it is these values that will form the opening balances of the new charitable company.

If any debts are larger than the assets being transferred and the new company does not have assets of its own to outweigh the debts, the debts cannot be transferred because this would mean an insolvent company was being created.

Draw up a formal deed of transfer or members' resolution

In most situations a formal deed will need to be drawn up that sets out the relationship between the old and the new organisations. However, if the organisation is fairly simple, a members' resolution can be used. The deed or resolution are likely to:

- Include information and assurances about the extent of assets and liabilities transferred
- Give promises by the new organisation, for example, to protect members of the old unincorporated body against later claims (indemnities)
- Authorise the new organisation to enforce obligations and collect monies due to the old organisation

- Oblige each side to preserve and make available for inspection all key records and documents
- Include work that needs to be done after the transfer date and which has been agreed between the 'old' organisation and the 'new 'company' as to which one will do it

Transfer of land, buildings or investments

If the original charity owns or occupies land or buildings, these assets must be transferred by a legal agreement. The transfer of a lease or tenancy agreement may require the consent of the freeholder or landlord. All such transactions should be handled by a solicitor. Investments, such as stocks and shares, must be formally transferred.

Transfer of staff

Staff are covered by employment protection regulations (TUPE). Staff contracts, statutory and virtually all contractual rights are transferred automatically to the new charitable company and there is no break in employment for employment law purposes. Employees should be formally notified of the identity of their new employer.

Transfer of property

Moveable property such as equipment and furniture can be transferred by simply giving them to the new organisation. A check should be made to ensure that guarantees on equipment are not invalidated once they are transferred. Leases, contracts to provide goods and services, hire purchase agreements or service and maintenance contracts must be transferred to the new company. This is called a 'novation' agreement and ideally contains a clause

releasing the original signatories from their obligations under the contracts. All such transactions should be handled by a solicitor.

Inform your funders

Funding arrangements, grant-aid arrangements, service contracts and other any funding arrangements which were given or promised to the original charity must be transferred to the new company. Funders should be made aware at an early stage of plans to incorporate because their consent may be necessary.

Inform your donors

Donors should be informed of the identity of the new company. If you expect to, or think you might, receive any future income to the old charity (for example, legacies) you should seek legal advice.

Open new bank accounts

All bank and other financial accounts will have to be in the full registered name of the new company, exactly as it is on the certificate of incorporation. Accounts might not need to be closed and new ones opened as long as the name of the new company is the same as the old organisation - you should check with the financial institutions involved.

Transfer insurances

All insurances must be transferred to the new company or old policies cancelled and new ones taken out. It is essential to take advice from your insurers as well as your legal advisor.

Inform the statutory authorities, pension provider, utility companies, etc.

HM Revenue & Customs, independent examiner/ auditors and pension scheme provider must be informed about the new

company. Accounts for gas, electricity and credit cards as well as accounts with suppliers and contractors have to be transferred to the new company even if the name has not changed. Everyone who does business with the organisation, or may have a claim against it, must know they are now dealing with a corporate body rather than an unincorporated organisation. If this is not done it could lead to the limited liability of the company's members being undermined.

Register members

There is no automatic transfer of membership. Members of the original charity must reapply for membership of the new company and must be entered on the register of members of the company, as required under company law.

Stationery

Stationery and written materials will need to be checked to make sure they show the correct information. Both company law and charity law have regulations regarding information that must appear on certain documents. It is illegal to use stationery without the company number and details of the charitable status of the company.

Stage 4 – Dissolution of the 'old' charity

In line with the provisions of the 'old' charity's constitution, call a general meeting

of the members and formally dissolve the organisation. Prepare final accounts for the old charity showing a nil balance and then wind it up and apply to the Charity Commission for it to be removed from the Register of Charities.

Don't forget to invite all the members of the old charity to become members of the new charitable company.

Support to incorporate an existing charity

Newcastle CVS www.cvsnewcastle.org.uk or information@cvsnewcastle.org.uk

Newcastle CVS through its Specialist Services can support organisations to incorporate an existing charity. You can contact us using the information as below.

Contact details for organisations mentioned in this information sheet

Companies House

Phone: 0303 123 4500

www.gov.uk/government/organisations/companies-house

Charity Commission Direct

Phone: 0300 066 9197

www.gov.uk/government/organisations/charity-commission

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